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IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

QUILL CORPORATION,

v.

Petitioner,

STATE OF NORTH DAKOTA,

BY AND THROUGH ITS TAX COMMISSIONER,

HEIDI HEITKAMP,

Respondent.

On Writ of Certiorari to the
Supreme Court of the State of North Dakota

**BRIEF AMICI CURIAE OF THE
NATIONAL ASSOCIATION OF MANUFACTURERS;
THE NATIONAL ASSOCIATION OF BROADCASTERS;
THE AMERICAN ADVERTISING FEDERATION;
THE AMERICAN ASSOCIATION OF ADVERTISING
AGENCIES, INC.; THE INDUSTRY COUNCIL ON
TANGIBLE ASSETS; AND
PRINTING INDUSTRIES OF AMERICA, INC.
IN SUPPORT OF PETITIONER**

JAN S. AMUNDSON
NATIONAL ASSOCIATION OF
MANUFACTURERS
1331 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 637-3000

*Counsel for Amicus
National Association of
Manufacturers*

BRUCE J. ENNIS, JR.*
DAVID W. OGDEN
THERESA CHMARA
JENNER & BLOCK
21 Dupont Circle, N.W.
Washington, D.C. 20036
(202) 223-4400

Counsel for Amici

* Counsel of Record

(Additional Counsel Listed on Inside Cover)

HENRY L. BAUMANN
NATIONAL ASSOCIATION OF
BROADCASTERS

1771 N Street, N.W.
Washington, D.C. 20036
(202) 429-5454

*Counsel for Amicus National
Association of Broadcasters*

JOHN KAMP
AMERICAN ASSOCIATION OF
ADVERTISING AGENCIES, INC.

1899 L Street, N.W.
Washington, D.C. 20036
(202) 331-7345

*Counsel for Amicus American
Association of Advertising
Agencies, Inc.*

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INTEREST OF AMICI¹

The National Association of Manufacturers of the United States of America ("NAM") is a voluntary business association of approximately 12,500 companies and

¹ The parties have consented to the filing of this *amici* brief. Their letters of consent are on file with the Clerk of the Court.

subsidiaries, employing eighty-five percent of all manufacturing workers and producing over eighty percent of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with NAM through its Associations Council and National Industrial Council.

The National Association of Broadcasters ("NAB"), organized in 1922, is a non-profit incorporated trade association that serves and represents America's radio and television stations and all the major networks.

The American Advertising Federation ("AAF") is a national trade association encompassing all elements of the advertising industry, including as members companies that produce and advertise consumer products; advertising agencies; magazine and newspaper publishers; radio and television broadcasters; radio and television networks; outdoor advertising organizations; and other media. Its membership also includes twenty-one national trade associations; over two hundred local advertising clubs, with 52,000 members; and over two hundred college chapters, with 6,000 student members.

The American Association of Advertising Agencies, Inc. ("A.A.A.A.") is the national trade association of the advertising agency business. The A.A.A.A. was founded in 1917 and includes as members 760 agencies, which operate more than 1,480 offices in the United States and 810 offices in 72 other countries. A.A.A.A. member agencies and their offices place approximately eighty percent of all agency-produced national advertising in the United States.

The Industry Council On Tangible Assets ("ICTA") is a non-profit trade association incorporated in Washington, D.C. in June, 1983. ICTA's members sell, distribute, trade, import, refine, store, or manufacture tangible assets—defined as, but not limited to, precious metals, numismatic coins, bullion coins, stamps, gems, sports-cards, jewelry, antiques and art objects. There are ap-

proximately five thousand businesses in the United States, ranging from small "mom and pop" shops to multinational businesses—that buy and sell these tangible assets. These articles are often unique, one-of-a-kind items, such as a particular coin. The nature of the market thus necessitates that collectors use an extensive 50-state network of local dealers to find the specific item they seek. This requires advertising in national trade papers and over computer networks. These weekly and monthly trade papers—published nationally—are a trading market and informational tool for consumers, who can cross-check prices with other dealers and comparison shop, thereby promoting competition and fair business practices.

Printing Industries of America, Inc. ("PIA") is a national trade association representing the interests of firms engaged in the printing business and printing support industries, such as suppliers and dealers. PIA's membership consists of approximately 13,500 member firms, with 31 affiliates throughout the United States and Canada serving specified metropolitan or regional areas. PIA addresses needs of its members that are national in scope.

Amici's members manufacture, sell or advertise goods. Many of those transactions are interstate in nature. *Amici* therefore have a direct interest in preserving the free flow of interstate business and interstate advertising.

North Dakota has asked the Court to overrule the longstanding precedent of *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), in which the Court held that States could not impose a use tax collection duty on a company with no physical presence in the taxing State. This request raises issues of vital significance to all manufacturing, advertising and business interests in this country.

Amici are vitally interested in clear and stable rules upon which businesses may rely in ordering their affairs. The need for a healthy national economy can be facili-

tated only through clarity and predictability in the law. That is why *amici* are concerned that the North Dakota Supreme Court has disregarded clear Supreme Court precedent and has substituted for the *Bellas Hess* "physical presence" test an "economic presence" test specifically rejected by the Court in that decision. *Amici* believe that principles of *stare decisis* counsel against discarding the bright-line test of *Bellas Hess*—upon which business has reasonably relied and structured its affairs—for the unworkable "economic presence" test adopted by the North Dakota Supreme Court. *Amici* also believe that the implications of overruling *Bellas Hess* would extend beyond the facts of this case. Business interests would no longer have confidence that they can rely on clear precedents of this Court, and that loss of confidence would harm the ability of businesses to engage in the efficient economic planning that is necessary to preserve a healthy and competitive national economy.

INTRODUCTION

In *Bellas Hess*, the Court held that States may not impose a use tax collection duty on mail order sellers "who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business." *Bellas Hess*, 386 U.S. at 758. The bright-line "physical presence" test of *Bellas Hess* has been applied repeatedly by lower courts to hold that an interstate business with no "physical presence" in the taxing State cannot be subjected to a use tax collection duty.²

² See, e.g., *Cally Curtis Co. v. Groppo*, 214 Conn. 292, 572 A.2d 302 (Conn.), cert. denied, 111 S.Ct. 77 (1990); *L.L. Bean, Inc. v. Com. Dept. of Revenue*, 516 A.2d 820, 826 (Pa. Cmwlth. 1986); *Good's Furniture House, Inc. v. Iowa State Bd. of Tax Review*, 382 N.W.2d 145, 150 (Iowa), cert. denied, 479 U.S. 817 (1986); *Rowe-Genereux, Inc. v. Vermont Dept. of Taxes*, 138 Vt. 130, 411 A.2d 1345, 1349 (Vt. 1980); see *infra* note 16 (discussion of application of *Bellas Hess* test by lower courts).

Although the North Dakota legislature realized that imposing use tax collection duty on companies without any "physical presence" in North Dakota would be prohibited by *Bellas Hess*, absent congressional action, it nevertheless enacted legislation that requires use tax collection by every business that engages in "regular or systematic solicitation," even if that business does not have a physical presence in the State. N.D.C.C. § 57-40.2-01(7).³ However, Congress declined to enact enabling legislation (see Point II, *infra*), so North Dakota's Tax Commissioner brought an action in state court seeking a declaration that Quill Corporation ("Quill") was required to collect use tax on its interstate sales to North Dakota residents. *State of North Dakota v. Quill Corp.*, 470 N.W.2d 203, 205 (1991). The state trial court granted summary judgment in Quill's favor, finding the statute unconstitutional as applied to Quill because North Dakota had failed to establish nexus under the *Bellas Hess* physical presence test. *Id.* at 205-06.

The North Dakota Supreme Court reversed. It held that the bright-line physical presence test of *Bellas Hess* should be abandoned, because the "burgeoning technological advances of the 1970's and 1980's have created revolutionary communications abilities and marketing methods which were undreamed of in 1967," when *Bellas Hess* was decided, and because the "sheer volume" of direct mail transactions had increased since the *Bellas Hess* decision. *Id.* at 208-09. The North Dakota Supreme Court applied an "economic presence" test taken directly from Justice

³ North Dakota House Concurrent Resolution No. 3083, 1987 Session Laws, Chapter 851 (Apr. 2, 1987), urged the United States Congress to "enact legislation to allow imposition of state sales and use taxes on mail order sales to purchasers within a state by out-of-state mail order companies," because North Dakota recognized that *Bellas Hess* precludes imposition of use tax collection duties on mail-order companies whose only connection to the State is through the mail and common carriers.

Fortas' dissent in *Bellas Hess*, *id.* at 214, and concluded that Quill's economic presence in North Dakota was sufficient to support imposition of a use tax collection duty. *Id.* at 216.

Quill is a direct mail order seller engaged in an interstate business. Like the mail order company in *Bellas Hess*, Quill has no stores, warehouses, sales agents or other "physical" contacts with the State seeking to impose the collection duty. Furthermore, Quill's "economic" presence in North Dakota is substantially less than the economic presence *Bellas Hess* had in Illinois: the interstate sales at issue in *Bellas Hess* were approximately \$2 million per year, which is *twice* the dollar value of the interstate sales at issue in this case. *Id.* at 204.⁴ By any measure, *Bellas Hess* had a greater "economic presence" in the taxing State than does the petitioner here.

Under the test of *Bellas Hess*, Quill could not be subjected to a use tax collection duty. To uphold application of the North Dakota statute to Quill, therefore, the Court must overrule *Bellas Hess*. The justifications advanced by the North Dakota Supreme Court for such a drastic step are not supported by the case law or the record. The legal and factual underpinnings of *Bellas Hess* remain valid, and the "physical presence" test has proven to be a clear and workable test upon which business has justifiably relied in ordering its affairs.

⁴ Nothing in the language or holding of *Bellas Hess* suggested that the holding would have been different if the company's use of the mails and of common carriers had produced sales to Illinois residents of \$3 million, \$10 million or \$20 million, rather than the \$2 million in sales at issue. See generally *Bellas Hess*, 386 U.S. at 761.

SUMMARY OF ARGUMENT

Clarity and stability are essential ingredients of laws that govern business conduct and expectations. Clear and stable rules facilitate rational and efficient business planning and minimize needless and wasteful litigation. Rules that permit such ordered planning and invite reliance upon settled principles further the purposes of the Commerce Clause. The principle of *stare decisis* encourages reliance on clear precedent and enables the business community to order its affairs and contribute to a healthy and competitive economy. Point I.

The "physical presence" test established by *Bellas Hess*, and applied by this Court and lower courts for a quarter century, is a clear and workable test that has enabled business to plan investments with knowledge of potential tax liability. Because of the long-standing nature of the *Bellas Hess* test and the ease of its application to investment planning, the business community has justifiably relied on it. The extensive reliance by the business community supports the application of *stare decisis*, which has greatest force in cases involving business and property rights. Furthermore, the fact that Congress has declined to exercise its Commerce Clause power to change the rule of *Bellas Hess*, though repeatedly urged to do so, is another weighty consideration in favor of *stare decisis*. Point II.

The "economic presence" test adopted by the North Dakota Supreme Court, and advocated by the dissent in *Bellas Hess*, is inherently unworkable. If the Court were to overrule *Bellas Hess* and rule that "economic presence" is sufficient to justify a use tax collection duty, business interests would not know how much, or what types of, economic presence would be constitutionally sufficient to trigger that duty. In future cases, the Court would be required to draw "economic" lines to develop a workable test of "economic presence." During that case-by-case determination of an "economic presence" test, interstate

businesses would be unsure of their use tax obligations, and would be compelled to pay tax assessments and implement costly compliance mechanisms that might later be found unjustified.

Whether to change the test of *Bellas Hess*, and, if so, how to define "economic presence," are policy judgments better left to Congress. Congress is institutionally better equipped to weigh the interests of the States against the interests of interstate businesses, and to decide which rule best serves the purposes of the Commerce Clause. Point III.

ARGUMENT

I. RULES GOVERNING BUSINESS CONDUCT AND EXPECTATIONS SHOULD BE BOTH CLEAR AND STABLE.

The Framers understood that "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them." THE FEDERALIST PAPERS, No. 78, at 471 (A. Hamilton) (C. Rossiter ed., 1961). Clear, bright-line rules obviously facilitate the ordering of business affairs and predictability, and minimize "arbitrary discretion" not only by courts, but also by taxing authorities. Moreover, the doctrine of *stare decisis* is a "basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'an arbitrary discretion.'" *Patterson v. McLean Credit Union*, 109 S. Ct. 2363, 2370 (1989).

A. A Healthy and Competitive Economy Requires Clear Rules.

Clarity in the law is important to businesses and to the goal of a healthy economy. The need for clear rules is particularly acute in the area of taxation, which directly

affects the profitability of calculated business activity. Businesses must be able to invest and act with knowledge of the actual tax burdens they will bear. Constitutional rules that "balance" state versus federal interests on an *ad hoc* basis generate crippling uncertainty. Rules that provide predictable outcomes foster reliance and therefore promote business activity and a healthy national economy. "Certainty allows businesses to plan and businesses which plan are more efficient and profitable."⁵ Collecting use taxes—potentially for 6,500 State and local jurisdictions—is a significant administrative burden, and the unreimbursed costs of collection are often quite substantial.⁷ Thus, in making virtually every decision—what business to engage in, how to do it, where to solicit business, and where to make investments in plant, warehouse and property—companies must consider whether they will

⁵ Daniel T. White, *Emerging State Use Tax Collection Legislation and the Out-of-State Mail Order Vendor: One Unconstitutional Step Beyond Scripto and National Bellas Hess*, 42 Fla. L. Rev. 775, 794 (1990); see also Jurinski, *Agency Relationships in Determining Nexus: Groping for a Solution*, 7 J. of State Taxation 321, 321 (1989) ("A basic tenet of our system of taxation is that taxpayers may arrange their affairs to minimize their tax liabilities. Unlike tax evasion, tax avoidance through careful planning of both transactions and corporate structures is a legitimate right of every taxpayer."); Walter Nagel, *The Emergence of A Single Nexus Standard*, Tax Notes (Tax Analysts) 327, 334 (Oct. 16, 1989) ("Uncertainty [about tax obligations] is also undesirable from a taxpayer's perspective because it does not allow for planning.").

⁶ White, *supra* note 5, at 801; Note, *Collecting the Use Tax on Mail-Order Sales*, 79 Geo. L.J. 535, 539 (1991).

⁷ See *infra* Point III (outlining the substantial administrative burdens of use tax collection in potentially thousands of State and local jurisdictions). Payment of the collected use tax to the taxing jurisdiction fully satisfies the jurisdiction's claim for payment for services it has ostensibly provided to the user. Thus, the unreimbursed cost of collection is simply a tax on engaging in interstate commerce, imposed on the interstate seller, not on the "use" of the seller's product in the taxing jurisdiction.

be required to collect use taxes. Uncertainty concerning these potential obligations frustrates rational business planning.⁸

Clear, certain and bright-line rules in the area of taxation facilitate reasonable foreseeability, allowing the vendor "prudently to arrange the business contacts with that State knowing the full ramifications of such actions."⁹ In the absence of clear rules, businesses are unable to make rational and informed decisions concerning risk and investment. In fact, clarity regarding legal obligations is so essential to an efficient marketplace that in most circumstances it is more important that the rule be clear, than that it be the "best" rule.¹⁰

B. A Healthy and Competitive Economy Requires Stable Rules.

Clarity of legal obligations is necessary to an efficient marketplace, but is not sufficient. A clear rule that is subject to change will frustrate rational business planning as much as a rule that is itself unclear. This Court has long recognized that *stare decisis* is the "preferred course"

⁸ Use tax collection duties may also subject businesses to related penalties and liabilities that differ from one State to the next and among local communities.

⁹ White, *supra* note 5, at 793-94; Jurinski, *supra* note 5, at 330 ("Tax compliance can be effective only if statutes, regulations, and case law provide bright lines for planning."); *see also* Nagel, *supra* note 5, at 334.

¹⁰ *See Sheddon v. Goodrich*, 8 Ves. 481, 497, 32 Eng. Rep. 441, 447 (Ch. 1803) (in case involving property interests, declining to revisit whether doctrine properly decided because "it is better the law should be certain, than that every Judge should speculate upon improvements"); *see also* J. Macey, *Costs and Benefits of Stare Decisis*, 65 Chi. Kent L. Rev. 93, 109 (1989) (advocating the importance of *stare decisis*, particularly in "corporate and contractual settings" where "having the 'correct' legal rule is less important than the consistent application of a precisely articulated rule").

because it "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 111 S. Ct. 2597, 2609 (1991).

The need for stability is one of the major factors compelling application of *stare decisis* principles.¹¹ "When rights have been created or modified in reliance on established rules of law, the arguments against their change have special force." *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 (1980). Thus, *stare decisis* is an "important social policy" that permits society to "satisfy reasonable expectations," *Helvering v. Hallock*, 309 U.S. 106, 119 (1940), and to "presume that bedrock principles are founded in the law rather than in the proclivities of individuals." *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986).

Stare decisis is particularly appropriate in Commerce Clause cases because the purpose of the Commerce Clause is to promote a healthy national economy, and adherence to established rules furthers that objective. Adherence to established rules, including constitutionally-based rules, is important because "ready alteration of constitutional rules makes the effects of statutes and private bargains less predictable." Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 Cornell L. Rev. 422, 431 (1988). Thus, "[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and

¹¹ *Irwin v. Veteran's Admin.*, 111 S. Ct. 453, 460 n. 3 (1990) (White, J., concurring) (*stare decisis* is of "'fundamental importance to the rule of law' . . . because, among other things, it promotes stability and protects expectations") (citations omitted); *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439, 2452 (1991) ("At its core, *stare decisis* allows those affected by the law to order their affairs without fear that the established law upon which they rely will suddenly be pulled out from under them.") (O'Connor, J., dissenting).

contract rights, where reliance interests are involved." *Payne v. Tennessee*, 111 S. Ct. at 2610.¹²

A healthy economy requires long-term investments.¹³ Uncertainty concerning profitability discourages long-term investments more than it discourages short-term investments. For virtually all long-term investments, reliable predictions of profitability require a legal landscape that is likely to remain unchanged for several years. Here, substantial long-term investments *have* been made in mail order and other interstate businesses based on the expectation that the "physical presence" test established in *Bellas Hess* would continue to be the law. If the Court had announced in *Bellas Hess* that its clear test was subject to change without notice, many of these investments would not have been made. Encouraging long-term investment is essential to a healthy economy, and rules that are both clear *and* stable are the necessary foundation for such investments.

¹² See *The Propeller Genesee Chief v. Fitzhugh*, 12 How. 443, 458, 13 L.Ed. 1058, 1065 (1851) (holding that "*stare decisis* is the safe and established rule of judicial policy, and should always be adhered to" in cases that "decide any question of property, or lay down any rule by which the right of property should be determined"); *National Bank of Genesee v. Whitney*, 103 U.S. 443, 444 (1881) ("The prosperity of a commercial community depends, in a great degree, upon the stability of the rules by which its transactions are governed." See also *Oregon ex rel. State Land Bd. v. Corvallis Sand and Gravel Co.*, 429 U.S. 363, 381 (1977) (holding that substantive rules governing real property are "peculiarly subject to the principle of *stare decisis*"); *United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 486-87 (1924) (same).

¹³ Peter F. Drucker, *THE NEW REALITIES* 123 (1989) ("investment" is the "world economy's economic driver" and the key to maintenance of a competitive economy).

II. THE COURT SHOULD NOT OVERRULE THE "PHYSICAL PRESENCE" TEST ESTABLISHED IN *BELLAS HESS* BECAUSE IT IS CLEAR AND WORKABLE, AND BECAUSE BUSINESS HAS JUSTIFIABLY RELIED ON IT.

For the foregoing reasons, in the business context particularly, "[v]ery weighty considerations underlie the principle that courts should not lightly overrule past decisions." *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970). A party asking the Court to overrule established law governing business expectations must meet a "severe burden" of demonstrating why the "broader societal interests in evenhanded, consistent, and predictable application of legal rules" should not outweigh any asserted need for change. *Thomas v. Washington Gas Light Co.*, 448 U.S. at 272.¹⁴ Indeed, "any departure from the doctrine of *stare decisis* demands special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984); see also *Patterson v. McLean Credit Union*, 109 S. Ct. 2363, 2370 (1989).

A "special justification" may be found to exist where the precedent has proven to be "an unworkable decision" that has caused confusion, *Patterson*, 109 S. Ct. at 2371 (citations omitted), or where there has been little reliance

¹⁴ The Court has also held that in the area of business and commerce, where fostering reliance is most essential, the possibility that a precedent may have been wrongly decided is not sufficient justification to overrule that precedent unless it was unworkable, engendered unpredictability, or was itself an aberration from prior precedent. See *National Bank v. Whitney*, 103 U.S. at 444 (holding that "[j]udicial decisions affecting the business interests of the country should not be disturbed except for the most cogent reasons, certainly not because of subsequent doubt as to their soundness"); cf. *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 496 (1987) (Scalia, J., concurring) (recognizing that precedent of state immunity from individual suits long assumed to be the law, and the basis for numerous federal statutes, should not be overruled "[e]ven if we were now to find that assumption [of immunity] to have been wrong").

on the precedent. *Thomas v. Washington Gas Light Co.*, 448 U.S. at 272; *id.* at 277 (declining to preserve precedent that "could only breed uncertainty and unpredictability" and that "has been so rarely followed" that "there appears to be little danger that there has been any significant reliance on its rule"). In this case, North Dakota has failed to meet its "severe burden" of demonstrating a "special justification" to overrule *Bellas Hess*. As demonstrated below, the "physical presence" test of *Bellas Hess* has proven to be clear and workable, and there has been widespread and justifiable reliance on that test by the business community.

A. The *Bellas Hess* Test Is Clear And Workable.

In *Bellas Hess*, the Court held that a State may not impose a use tax collection duty on a "seller whose only connection with customers in the State is by common carrier or the United States mail." 386 U.S. at 758. As one commentator has noted, this "bright line test . . . aids in achieving certainty, and allows mail order businesses to plan," because "[r]equiring physical situs in a taxing state through either agents or property provides mail order vendors with a clear understanding of the potential ramifications of their business arrangements."¹⁵ Lower courts have had no difficulty applying the simple *Bellas Hess* test that lack of *any* physical presence in the taxing State is sufficient to excuse any use tax collection duty.¹⁶

¹⁵ White, *supra* note 5, at 794.

¹⁶ Although courts have been asked in some cases to determine whether a particular "type" of physical contact with a taxing state constitutes sufficient nexus, there has been no question that where the only contact is through common carrier or mail, the state cannot impose a use tax collection duty. See, e.g., *L.L. Bean, Inc. v. Com. Dept. of Revenue*, 516 A.2d 820, 826 (Pa. Cmwlth. 1986) (holding that determination of nexus is a factual question, but no question that imposition of collection duties is prohibited on "out-of-state mail-order firms whose only connection with the taxing

B. Business Has Justifiably Relied On The *Bellas Hess* Test.

Business reliance on *Bellas Hess* has been substantial and justified.¹⁷ Reliance on Supreme Court decisions is rational and expected. Indeed, business should be *encouraged* to order its affairs in reliance on rules established by judicial precedent. In *National Bank of Genesee v. Whitney*, 103 U.S. 443 (1881), the Court refused to over-

state is soliciting and filling orders through the stream of interstate commerce"); *Good's Furniture House, Inc. v. Iowa State Bd. of Tax Review*, 382 N.W.2d 145, 150 (Iowa) (sufficient nexus where out-of-state seller utilized own trucks to make deliveries to State, but reiterating that nexus "cannot be found where the out-of-state seller merely communicates with customers in the taxing state by mail or common carrier as in *National Bellas Hess*"), *cert. denied*, 479 U.S. 817 (1986); *Rowe-Genereux, Inc. v. Vermont Dept. of Taxes*, 138 Vt. 130, 411 A.2d 1345, 1349 (Vt. 1980) (holding that "requisite nexus can be found in the case of a mail order seller with retail outlets, solicitors or property within the taxing state . . . but cannot be found where the out-of-state seller merely communicates with customers in the taxing state by mail or common carrier as in *National Bellas Hess*"); see also *S.F.A. Folio Collections v. Bannon*, 585 A.2d 666, 670-71 (Conn.) (same), *cert. denied*, 111 S. Ct. 2839 (1991); *Cally Curtis Co. v. Groppo*, 214 Conn. 292, 572 A.2d 302 (Conn.) (same), *cert. denied*, 111 S. Ct. 77 (1990); *Burke & Sons Oil Co. v. Director of Revenue*, 757 S.W.2d 278, 280 (Mo. App. 1988) (same).

Even though the Tennessee Supreme Court recognized the validity of the *Bellas Hess* rule last year, *Pearle Health Services, Inc. v. Taylor*, 799 S.W.2d 655 (Tenn. 1990), a lower court recently held that Tennessee could impose a use tax collection duty on direct mail operators with no physical presence in the state. *SFA Folio Collections, Inc. v. Huddleston*, No. 89-3015-III (Davidson Cty. Chancery Ct. Tenn. Mar. 11, 1991); *Bloomington's By Mail Ltd. v. Huddleston*, No. 89-3017-II (Davidson Cty. Chancery Ct. Tenn. Mar. 8, 1991). The *Bloomington's* case is on appeal to the Tennessee Supreme Court and the *SFA Folio* case has been stayed pending the outcome of the *Bloomington's* appeal.

¹⁷ See Brief *Amicus Curiae* of the Direct Marketing Association In Support of the Petition for Certiorari and In Support of Summary Reversal, No. 91-194, at 2 (Filed Sept. 3, 1991).

rule a precedent—even though it questioned the “soundness” of it—because the Court *presumed* that business had relied on the precedent:

The Construction of the Act of Congress thus given has been acted upon by the national banks throughout the country ever since it was published. It is not unreasonable to *suppose* that they have conducted their business and made loans to a large amount in reliance upon it, and that in many cases great injury would follow a departure from it. Judicial decisions affecting the business interests of the country should not be disturbed except for the most cogent reasons, certainly not because of subsequent doubt as to their soundness. The prosperity of a commercial community depends, in a great degree, upon the stability of the rules by which its transactions are governed.

Id. at 444 (emphasis added).¹⁸ In this case, business interests have in fact relied upon *Bellas Hess*. Direct mail order companies and other interstate businesses have designed their operations and planned their investments in reliance on the “physical presence” test. Their reliance in fact is an even more compelling argument for *stare decisis* than the “supposed” reliance in *Whitney*. In light of this actual and substantial reliance, the argument for *stare decisis* has “special force” in this case. *Thomas v. Washington Gas Light Co.*, 448 U.S. at 273.

That reliance has been fully justified because courts, including this Court, have consistently reaffirmed and applied the test of *Bellas Hess*, and this Court has never intimated that *Bellas Hess* might be overruled.¹⁹

¹⁸ See *The Propeller Genesee Chief v. Fitzhugh*, *supra* note 12, in which the court said it would be “bound to follow” business precedent.

¹⁹ See, e.g., *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 32-33 (1988) (finding “‘nexus’ aplenty” with Louisiana and finding case

The doctrine of *stare decisis* has greatest force in cases of congressional domain where Congress has the authority to enact legislation that alters the rule established by the Court.²⁰ Although this case deals with a constitu-

distinguishable from *Bellas Hess* because D.H. Holmes had thirteen stores in Louisiana while *Bellas Hess*’ “only connection with its Illinois customers was by mail or common carrier”); *Nat. Geographic Soc. v. Cal. Bd. of Equalization*, 430 U.S. 551, 559 (1977) (reaffirming “sharp distinction” between mail order companies in the State like *Bellas Hess* “who do no more than communicate with customers by mail or common carrier as part of a general interstate business” and those that have a “physical” presence within the taxing State); see also *Goldberg v. Sweet*, 109 S. Ct. 582, 589-90 (1989) (holding that taxation of interstate telephone call in State of origination and termination where service address is listed or bill is paid is permissible, but expressing “doubt that termination of an interstate telephone call, by itself, provides a substantial enough nexus for a State to tax a call,” citing the *Bellas Hess* holding that “receipt of mail provides insufficient nexus”). Indeed, this Court denied certiorari in two recent cases where lower courts upheld the validity of the “physical presence” test of *Bellas Hess* and rejected arguments similar to those raised by North Dakota in this case. See *S.F.A. Folio Collections v. Bannon*, 585 A.2d 666, 670-71 (Conn.), *cert. denied*, 111 S. Ct. 2839 (1991); *Cally Curtis Co. v. Groppo*, 214 Conn. 292, 572 A.2d 302 (Conn.), *cert. denied*, 111 S. Ct. 77 (1990).

The substantial reliance on the precedent of *Bellas Hess* by business interests here thus distinguishes this case from *Arkansas Elec. Co-Op. Corp. v. Arkansas Pub. Serv. Comm’n*, 461 U.S. 375, 392 (1983), where the Court abandoned the bright line test of *Public Util. Comm’n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927). In *Arkansas Electric*, the Court could “see no strong reliance interests that would be threatened” by rejection of the prior test. The contrary is true in this case.

²⁰ *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1931) (Brandeis, J., dissenting) (“*Stare decisis* is usually the wise policy . . . even where the error is a matter of serious concern, provided correction can be had by legislation”); see also *Flood v. Kuhn*, 407 U.S. 258, 283 (1972). The Court has at times indicated that it may be most bound by principles of *stare decisis* in cases involving statutory interpretation, because Congress can change

tionally-based rule, precedents based on the "dormant" aspect of the Commerce Clause are very different from precedents based on the First Amendment, the Fourth Amendment, or other provisions of the Constitution that are designed to *restrict* the power of Congress. Congress has plenary power under the Commerce Clause, and could by statute modify the rules governing States' imposition of use tax collection duties. See *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 423 (1946) (Congressional authority over interstate commerce is "plenary" and "supreme").²¹ Because Congress has the authority to change the test established in *Bellas Hess* and adopt an economic presence test, the Court should be more reluctant to over-

those precedents by statute (and presumably would have an incentive to do so if the Court had interpreted the statute in a way not intended by Congress), and less bound by principles of *stare decisis* in cases involving questions of constitutional interpretation, because Congress cannot ordinarily change constitutional precedents by statute. See *Payne v. Tennessee*, 111 S.Ct. at 2609-10 ("Stare decisis is not an inexorable command. . . . This is particularly true in constitutional cases, because in such cases 'correction through legislative action is practically impossible'") (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. at 407 (Brandeis, J., dissenting)). Commentators have criticized the constitutional/statutory distinction in *stare decisis* jurisprudence on the grounds that "[r]eady overruling of constitutional cases . . . reduces the stability of governmental institutions," see Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 Cornell L. Rev. 422, 430 (1988), and that often the "results," if not the decisions, "can be 'overruled' by statute." Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L. Rev. 723, 742 (1988). In any event, this case is more akin to statutory interpretation cases because under the Commerce Clause Congress has the constitutional authority to change the test established by *Bellas Hess* if it believes a different test is warranted.

²¹ *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 213 (1983) ("The Commerce Clause is a grant of authority to Congress, and not a restriction on the authority of that body.").

rule *Bellas Hess* than it would be to overrule decisions based on provisions of the Constitution that restrict congressional power.

Moreover, Congress is fully aware of the *Bellas Hess* test and through the years has considered legislation to change that test.²² Congress has conducted hearings and commissioned studies to evaluate state use taxes and use tax collection duties.²³ But Congress has declined to enact such legislation, leaving the test of *Bellas Hess* undisturbed. It is difficult to discern congressional intent from congressional silence, but the refusal of Congress to exercise its plenary power to change a "negative" Commerce Clause ruling of this Court should counsel against adoption of a new rule Congress has considered, but declined to adopt.²⁴ The *Bellas Hess* test should thus be retained, and any revision left to Congress.

²² Legislation proposing a uniform federal response to state imposition of use tax collection obligations has been introduced numerous times. See, e.g., H.R. 2230, 101st Cong., 1st Sess., 135 Cong. Rec. H1662 (daily ed. May 4, 1989); S. 480, 101st Cong., 1st Sess., 135 Cong. Rec. S1920 (daily ed. Mar. 1, 1989); H.R. 3521, 100th Cong., 1st Sess., 133 Cong. Rec. H8916 (daily ed. Oct. 21, 1987); H.R. 1242, 100th Cong., 1st Sess., 133 Cong. Rec. H835 (daily ed. Feb. 25, 1987); S. 1099, 100th Cong., 1st Sess., 133 Cong. Rec. S5600 (daily ed. Apr. 28, 1987); S. 639, 100th Cong., 1st Sess., 133 Cong. Rec. S2682 (daily ed. Mar. 3, 1987).

²³ See *Interstate Sales Tax Collection Act of 1987 and the Equity in Interstate Competition Act of 1987: Hearings Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary to Consider H.R. 1242, H.R. 1891 and H.R. 3521, 100th Cong., 2d Sess. (1988); Collection of State Sales and Use Taxes by Out-of-State Vendors: Hearings Before the Subcomm. on Taxation and Debt Management of the Senate Comm. on Finance to Consider S. 639 and related S. 1099, the Equity in Interstate Competition Act of 1987, 100th Cong., 1st Sess. (1987).*

²⁴ Cf. *Bob Jones University v. United States*, 461 U.S. 574, 600-01 (1983) (holding that Court's general reluctance to rely on congressional silence inapplicable in situation where Congress by

III. THE GREATER AMBIGUITY OF AN "ECONOMIC PRESENCE" TEST WOULD JEOPARDIZE RATIONAL BUSINESS PLANNING AND INVOLVE THE COURT IN POLICY JUDGMENTS BETTER LEFT TO CONGRESS.

When the Court has determined that precedent must be overruled, it has often done so to substitute a clearer and more workable rule. *See, e.g., California v. Acevedo*, 111 S. Ct. 1982 (1991). That justification does not apply here. The "economic presence" test adopted by the North Dakota Supreme Court, and urged by several States, is inherently less certain than the *Bellas Hess* "physical presence" test. For example, many state statutes—including the North Dakota statute at issue in this case—impose use tax collection duties on retailers (including direct mail businesses) who solicit sales on a "continuous," "regular," "systematic," "purposeful," "substantial" or "recurring" basis.²⁵ The uncertainty of such an

holding hearings and considering several bills on the precise issue without taking any action demonstrated that it had "prolonged and acute awareness" of the issue and "acquiesced" in the status of the administrative rulings at issue); *see also Flood v. Kuhn*, 407 U.S. at 283 (recognizing that inapplicability of antitrust laws to major league baseball was an "aberration," but declining to overrule precedent in light of congressional awareness of issue and congressional decision not to enact different legislation); *Square D. Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 424 (1986) (declining to overrule *Keogh v. Chicago & Northwestern R. Co.*, 260 U.S. 156 (1922), where rule had received "careful, intense and sustained congressional awareness" and Congress chose not to change the rule).

²⁵ *See* Ariz. Rev. Stat. Ann. § 42-1401(5)(b) (1991) ("substantial and recurring"); Ark. Stat. Ann. § 26-53-121(b) (Supp. 1989) ("continuous, regular or systematic"); Conn. Gen. Stat. Ann. §§ 12-407(12)(g) & (15)(e) (West Supp. 1991) ("regular or systematic"); Fla. Stat. § 212.0596(2)(e) (West Supp. 1991) ("purposefully or systematically"); Ga. Code Ann. § 48-8-2(3)(H) (Supp. 1991) ("regular or systematic"); Kan. Stat. Ann. § 79-3702(h)(2) (Supp. 1990) ("regular or systematic"); La. Rev. Stat. Ann. § 47:301(4)(1) (West Supp. 1991) ("regular or systematic");

economic presence test will create widespread confusion. Interstate business will be forced to speculate whether their solicitations are sufficiently regular, systematic or substantial to subject them to use tax duties, and will be unable to forecast tax liability and investment risk. Courts will be forced to decide countless issues: what is the meaning of "regular" or "systematic"; whether solicitations that are substantial in number but not "continuous" are sufficient; and whether requiring use tax collection for a "purposeful" but "slight" economic presence unduly burdens interstate commerce.

Indeed, the North Dakota statute at issue in this case is likely to spawn additional litigation. North Dakota requires use tax collection by every business that engages in "regular or systematic solicitation." N.D.C.C. § 57-40.2-01(7). The North Dakota Administrative Code defines "regular or systematic solicitation" as "three or more separate transmittances of any advertisement or advertisements" during a twelve-month period. N.D.A.C. § 81-04.1-01-03.1. Thus, even if the Court determines in this case that Quill's solicitations in North Dakota would be sufficient under a constitutionally-based "economic presence" test to justify a use tax collection duty, the Court will be required in future cases to determine whether a company with merely three, five or ten solici-

Mass. Ann. Laws ch. 64H § 1 (West Supp. 1991) ("regularly or systematically"); Minn. Stat. Ann. § 297A.21, subd. 4(a) (1991) ("regular or systematic"); Mo. Ann. Stat. § 144.605(2)(a) (Vernon Supp. 1991) ("purposefully or systematically"); N.C. Gen. Stat. § 105-164.8(b)(5) (Supp. 1991) ("purposefully or systematically"); Okla. Stat. Ann. tit. 68, § 1354.2 (West Supp. 1992) ("continuous, regular or systematic"); Pa. Stat. Ann. tit. 72, § 7201(b)(3) (Purden 1990) ("regularly or substantially"); R.I. Gen. Laws §§ 44-18-15(1)(E) & -23(c) (Michie Supp. 1990) ("regular or systematic"); Tenn. Code Ann. § 67-6-102(6)(J) (1989) ("regular or systematic"); Utah Code Ann. §§ 59-12-102(9)(c) & (17)(b) (Michie Supp. 1991) ("regular or systematic"); Vt. Stat. Ann. tit. 32, § 9701(9)(F) (Supp. 1990) ("regular, systematic or seasonal").

tations (and no physical presence in North Dakota) may constitutionally be compelled to collect use tax. The Court will also be required, when reviewing other state statutes or local ordinances that focus on sales rather than on solicitations, to determine whether \$1,000 of business, or ten sales, constitutes sufficient economic presence to justify the burden on interstate commerce created by use tax collection duties. Those "economic" lines cannot be established in this case, which involves the solicitations of one company in one taxing locale. Furthermore, determining where the "economic" line should be drawn is a policy judgment better left to Congress.

Even if the Court could engage in case-by-case adjudication until a clear and workable definition of "economic presence" emerges, in the interim, interstate businesses will be unable to order their affairs and plan their investments with reasonable certainty. Although businesses can easily comply with the physical presence test of *Bellas Hess* by not placing stores, warehouses or salespeople in a particular State, unless and until an "economic presence" test is spelled out precisely in future cases, businesses will be unable to gauge their use tax collection duties with reasonable certainty.

Moreover, the factual predicate for the *Bellas Hess* test remains entirely valid. The burden of collection that North Dakota (and other States and localities) would impose on interstate commerce would even be compounded by the greater volume of mail order sales and the greater number of local taxing jurisdictions.²⁶ Despite the advent

²⁶ The North Dakota Supreme Court justified its departure from *Bellas Hess*, in part, on the ground that the percentage of sales from mail order companies, as compared with those of in-state retailers, has supposedly increased since *Bellas Hess* was decided. *Id.* at 209-10. It is pure conjecture to suppose, however, that this Court would have decided *Bellas Hess* differently had mail order companies in general had a greater percentage of overall sales in

of new computer technology that might be utilized to facilitate compliance with use tax collection duties, enormous and costly administrative burdens remain.²⁷ Although computer tax programs can (at significant expense) track different tax rates, computers cannot take account of myriad *exemptions* from tax (for both purchasers and goods) that are authorized by many statutes and local ordinances. See Brief *Amicus Curiae* of the Direct Marketing Association in Support of the Petition for Certiorari and In Support of Summary Reversal, No.

Illinois. In fact, the *Bellas Hess* Court—concluding that it would be "difficult to conceive of commercial transactions more exclusively interstate in character than the mail order transactions" there (and here) involved—held explicitly that the tax collection duty could not be imposed because of the *burden* that such taxation would impose on the mail order company. Those burdens have increased. When *Bellas Hess* was decided, only 11 states and 2,300 jurisdictions imposed use taxes. *Bellas Hess*, 386 U.S. at 758-59 & nn.11, 12. The Court nevertheless found the collection duty burdensome because of the "many variations in rates of tax, in allowable exemptions and in administrative and record-keeping requirements." *Id.* at 759 (emphasis added). Today, over 6,500 jurisdictions impose their own use taxes. Note, *supra* note 6, at 539. If the rule urged by North Dakota is adopted, 6,500 jurisdictions might require use tax collection by companies without physical presence in their respective jurisdictions.

²⁷ For example, many of *amicus* ICTA's members are small shops with few or no employees. For them, the administrative costs of collecting various use taxes and keeping current on the use tax laws and regulations of many jurisdictions would be prohibitive. Many of these members do not have computer systems, other than word processing programs for mailing lists and inventory management. In most coin shops, for example, bookkeeping is done manually. Monitoring and complying with a plethora of state and local tax requirements would be impossible, forcing small dealers out of business or restricting their ability to sell to collectors in states with use tax collection duties, thereby creating a less competitive market for consumers. Several "mom and pop" businesses have indicated to ICTA that they will either cease to advertise or cease business operations if advertising is deemed sufficient to create nexus for the purpose of use tax collection.

91-194, at 10-13 (Sept. 3, 1991).²⁸ Additionally, an independent study has shown that the average mail order firm spends fifteen percent of tax collected on compliance costs, while being reimbursed by the taxing State at the rate of only one percent. TOUCHE ROSS, *A Study to Determine the Economic Impact on Mail Order Firms of Multi-State Sales Tax Collection*, at 5 (1986).²⁹ If companies were required to collect use taxes in jurisdictions where they have no physical presence, those costs would substantially increase. Thus, the expansion of tax liability entailed by the North Dakota Supreme Court's rule would seriously hamper interstate commerce.

If these burdens are to be imposed on interstate commerce, in derogation of the *Bellas Hess* rule, the change should be accomplished by Congress, not the Court. In many areas the Constitution requires considerable deference to the views of the States. The Commerce Clause, however, gives Congress plenary power: "Congress shall have Power . . . [t]o regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes." Constitution, Art. 1, § 8, Cl. 3; see *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 423 (1946) (the power of Congress over interstate commerce is "plenary" and "supreme"). By entrusting the responsi-

²⁸ See also Levering, *An Examination of the Merits of Federal Legislation to Require Out-of-State Mail Order Companies to Collect State Use Taxes*, 4 N.Y.U. Inst. on St. and Local Tax'n, § 8.03 [1], at 8-12 (1986) ("Every set of exemptions is a different maze of complexities.").

²⁹ Additional costs mail-order firms would face under the North Dakota Supreme Court's test include: direct payments attributable to customer error in not including use tax or including an insufficient amount; increased costs of filing tax returns with local jurisdictions that require separate filing and remittance; costs of being audited by more jurisdictions; additional credit card fees (which are assessed on the total amount, including taxes); and increased employee training and computer costs. *Id.* Legal fees for filing returns and monitoring over 6,500 jurisdictions would also rise.

bility to regulate interstate commerce exclusively to Congress, the founders were attempting to design a framework that would ensure a healthy national economy.³⁰ Indeed, the Court concluded its opinion in *Bellas Hess* with a virtual invitation to Congress to review its decision: "this is a domain where Congress alone has the power of regulation and control." 386 U.S. at 760. Congress is best able to determine whether "technological advances" or an increase in "volume" necessitates a change in the *Bellas Hess* test. Congress can more efficiently and fairly evaluate the "economic realities."³¹ Congress is better able to weigh the competing policy interests to determine whether the "physical presence" test has lost its utility and whether a clear "economic presence" test can be crafted that would protect interstate businesses from undue "local entanglements."³²

For example, Congress could require a *single* tax rate (which States could then apportion among their political subdivisions), thereby reducing substantially the costs

³⁰ THE FEDERALIST PAPERS, No. 11, at 87 (A. Hamilton) (C. Rossiter ed. 1961) ("Under a vigorous national government, the natural strength and resources of the country, directed to a common interest, would baffle all the combinations of European jealousy to restrain our growth.").

³¹ Note, *supra* note 6, at 565 (arguing that congressional, rather than judicial, action is necessary because "[w]hen Congress drafts legislation on use tax collection both the mail-order industry and the state taxing agencies are represented . . .").

³² Proponents and critics of the "physical presence" test alike have argued that Congress, not the judiciary, is better equipped to establish a workable "economic presence" test that will foster certainty and stability and permit interstate businesses to order their investments in reliance on clear principles. See, e.g., Nagel, *supra* note 5, at 334 ("Ideally, the Supreme Court should not be in the business of making state tax law."); Hartman, *Collection of the Use Tax on Out-of-State Mail-Order Sales*, 39 Vand. L. Rev. 993, 1028 (1986) (arguing that Congressional action is needed because "[t]here appears to be no adequate judicial machinery to establish . . . [fair compliance] costs").

and administrative burdens of use tax collection. Congress could specify that certain businesses, or businesses with sales or solicitations below a certain level, are entirely exempt from use tax collection duties. Congress could also enact legislation that would be phased in over a period of years, thereby avoiding undue disruption and permitting businesses to adjust their investments and plans to accommodate the burdens and costs of new use tax collection responsibilities.³³

The Court has long recognized that where business interests have relied on rules and interpretations established by the Court, "[i]f there should be a change, the Legislature can make it with infinitely less derangement of the interests of the country than would follow a new ruling of the court." *National Bank v. Whitney*, 103 U.S. at 444. This is particularly true in Commerce Clause cases, where Congress obviously has the greater competence to weigh the policy arguments for or against a new rule.

Thus, because the Court should assume that Congress will change judicial rules regulating interstate commerce if there is a need to do so, and because *stare decisis* should apply with particular force to precedents on which business has justifiably relied, the Court should not overrule *Bellas Hess*.

³³ *Amici* take no position on whether Congress should enact legislation, and offer these examples of possible congressional action simply to illustrate why Congress is best suited to make the important policy judgments required in this area of taxation of interstate commerce.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

JAN S. AMUNDSON
NATIONAL ASSOCIATION OF
MANUFACTURERS
1331 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 637-3000
Counsel for Amicus
National Association of
Manufacturers

HENRY L. BAUMANN
NATIONAL ASSOCIATION OF
BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036
(202) 429-5454
Counsel for Amicus National
Association of Broadcasters

JOHN KAMP
AMERICAN ASSOCIATION OF
ADVERTISING AGENCIES, INC.
1899 L Street, N.W.
Washington, D.C. 20036
(202) 331-7345
Counsel for Amicus American
Association of Advertising
Agencies, Inc.

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BRUCE J. ENNIS, JR.*
DAVID W. OGDEN
THERESA CHMARA
JENNER & BLOCK
21 Dupont Circle, N.W.
Washington, D.C. 20036
(202) 223-4400
Counsel for Amici
* Counsel of Record